Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

J.E. SIMMONS,

Petitioner,

v.

WEBSTER COUNTY, acting by and through its BOARD OF COUNTY COMMISSIONERS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the statutory and case law of the State of Georgia fail to protect the legal and constitutional rights of private landowners contesting condemnation action by a governmental body seeking to condemn and take private property?

LIST OF PARTIES

The names of all parties to this case appear in the caption of the case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, J.E. Simmons, prays that a writ of certiorari issue to review the judgment entered in this case by the Court of Appeals of Georgia on March 4, 1997; Application for Writ of Certiorari to the Supreme Court of Georgia denied on September 12, 1997.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN CASE BY COURTS

Oral Order of the Superior Court of Webster County, State of Georgia on February 5, 1996, denying the Petitioner's exceptions and objections to the condemnation proceeding, which is not reported and is transcribed in the Appendix hereto at App. 15-26.

Simmons v. Webster County, 225 Ga. App. 830 (485 S.E. 2d 501) (1997), Court of Appeals of Georgia, Case No. 896A1861, Decision dated March 4, 1997, Reconsideration Denied April 1, 1997, which is reprinted in the Appendix hereto at App. 1-14.

Denial of Writ of Certiorari, dated September 12, 1997, by the Supreme Court of Georgia, *J.E. Simmons v. Webster County*, Case No. S97C1218, which is reprinted in the Appendix at App. 27.

STATEMENT OF THE BASIS OF JURISDICTION

The date of the Judgment sought to be reviewed is September 12, 1997, the date the Supreme Court of Georgia denied the Petitioner's Petition for Writ of Certiorari of the Georgia Court of Appeals' Decision issued March 4, 1997.

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. § 1257.

28 U.S.C. § 2403(b) may apply and the Attorney General for Georgia shall be notified pursuant to Rule 29.4(c).

STATEMENT OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

Special Master Act, Georgia Law 1957, Page 387 as amended, for expedited condemnation proceedings found at O.C.G.A. §§ 22-2-100 through 22-2-114, which is set forth in the Appendix at App. 28-45.

Official Code of Georgia §§ 22-2-61 through 22-2-63, which is set forth in the Appendix at App. 45-47.

United States Constitution, Amendment V to the Constitution, which states:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be

> twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV. Section 1 to the Constitution, which states:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Georgia Constitution, 1983, Article 1, Section 1, Paragraph 1 which states, "No person shall be deprived of life, liberty, or property except by due process of law."

Georgia Constitution, 1983, Article 1, Section 1, Paragraph 2, which states, "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the law."

STATEMENT OF THE CASE

This case arises from a condemnation proceeding in Webster County, Georgia. That proceeding included Petitioner's timely written exceptions contesting the validity

and constitutionality of the condemnation proceeding itself. The Petitioner raised the federal questions sought to be reviewed in his written "Exceptions of J.E. Simmons, Condemnee and Special Master's Findings, Ruling, and Award", filed July 31, 1995, in the trial court, set forth in the Appendix, App. 48-53, and in his "Answer and Defenses of Condemnee, J.E. Simmons", filed of record in the trial court on August 7, 1995, set forth in the Appendix, App. 54-61.

The questions were denied by the trial court in its oral ruling and hearing on February 5, 1996, and record of the oral ruling is found in the transcript in the Appendix at App. 15-26.

The Georgia Court of Appeals denied Petitioner's appeal of the exceptions and questions in a decision of March 4, 1997. *See*, Decision of the Georgia Court of Appeals, App. 1-14.

The Petitioner, as a private landowner, was a condemnee in the case.

The Respondent was the condemnor.

This case arises from the trial court's denial of Petitioner's written exceptions contesting the legality and constitutionality of the Special Master's findings, rulings, and awards, and the condemnation proceedings itself. The trial court's denial was rendered without conducting a *de novo* hearing; without receipt of evidence and testimony; and without providing any statutory or constitutional protections to the Petitioner.

The Respondent filed its Petition for In Rem Condemnation of an easement or a lease-hold interest before

a Special Master on July 5, 1995. This was an expedited proceeding under the Special Master Act, Georgia Laws, 1957, as amended. The statutes are found in the O.C.G.A. in § 22-2-100 through § 22-2-114, included in the Appendix (App. 28-45).

The Respondent sought an easement to rebuilt an earthen dam and county road that sat on top of the dam. The dam and county road had been washed out in the flooding of the summer of 1994.

The Petitioner owns the land on both sides of the earthen dam and county road. He purchased that land in 1988 from the previous private landowner, Millard Kennedy.

In 1956 or 1957 the Respondent had obtained a 60 foot easement and built the earthen dam and county road on top of the dam. Kennedy Lake was not created by the Respondent. It was not created by Respondent's construction of the dam and county road in 1956 or 1957. It was created by Millard Kennedy, as private landowner upon his own land adjacent to the dam in July 1957.

Kennedy Lake was not a public lake and was not created by the Respondent; it was a private lake created by a private landowner (Petitioner's predecessor in title) on his own land; it had drainage boards on the private land on Petitioner's land which controlled the level of water in the land. The Respondent had no title to the land covered by the water backed up by the drainage controls; the Respondent had no easement to the land covered by the water; the Respondent was not authorized to decide whether the private land owned by the Petitioner should be covered with water after the earthen dam was rebuilt.

In the summer flooding of 1994, a flood washed out the earthen dam and the lake water drained off the Petitioner's land. Approximately 37 acres of Petitioner's land were uncovered by this draining.

Thereafter, the Petitioner as a private landowner, decided to plant pine trees upon the 37 acres of land in December 1994.

The Respondent's condemnation action seeks to increase the existing dam easement from 60 feet to 140 feet; to change the slope of the dam; fill the Petitioner's adjacent land with water; change the former lake from a private lake to a public access lake; create new public parking facilities within the expanded easement; invite the public to fish in the lake; and place a new drainage control system within the expanded 140 foot easement so Respondent can control the flow of the water to back-up water on Petitioner's land.

The water would not automatically back-up on Petitioner's land when the dam was rebuilt. Rather, the water can be retained or drained out of the drain pipes that Respondent intends to place within its expanded 140 foot easement. The Petitioner previously had control of the drainage controls when the easement was only 60 feet wide.

The Petitioner objected, excepted, and contested the Respondent's plans to reflood his private land to create a public access and public use lake on his private land where no such public lake had previously existed. A Special Master's Hearing was held on Respondent's Petition for Condemnation on Friday, July 21, 1995. The Special Master then made an award pursuant to the

statutorily mandated form as to value only. The award was made the judgment of the trial court.

The Petitioner timely filed his written Exceptions to the Special Master's Finding, Ruling, and Award. The Petitioner also timely filed his separate written Answer and Defenses.

The questions sought to be reviewed were raised by the Petitioner in his written "Exceptions of J.E. Simmons, Condemnee, to Special Master's Finding, Ruling, and Award", filed July 31, 1995, in the trial court (App. 48-53).

The questions were also raised in Petitioner's "Answer and Defenses of Condemnee, J.E. Simmons", filed of record in the trial court on August 7, 1995 (App. 54-61).

On February 5, 1996, the trial court conducted a short and brief hearing on the Petitioner's Exceptions to the Special Master's Finding, Ruling, and Award (App. 15-26).

The Petitioner's written exceptions and the trial court's hearing on the exceptions raised questions of fact, including the purpose of the proposed taking; whether there had been an adverse possession by the Respondent; whether Respondent seeks to create public parking and public access to a public lake to be made on Petitioner's adjoining land; whether the taking proposed by the Respondent is excessive or is actually needed to do the dam and road projects; whether it takes from the Petitioner private property that Petitioner is not being compensated for; whether there are other ways to do the project; whether the taking of Petitioner's land is without

due process and protection and without authority of law, and without giving Petitioner adequate and just compensation.

The trial court denied the Petitioner's exceptions in total, without conducting an evidentiary or a hearing *de novo* on the exceptions. The trial court simply, after oral argument concerning the issues, denied the exceptions.

The Petitioner subsequently appealed the trial court's oral ruling and the jury's value award to the Georgia Court of Appeals. The Georgia Court of Appeals denied Petitioner's appeal on his exceptions in its decision of March 1997.

The Georgia Court of Appeals subsequently denied the Petitioner's Motion for Reconsideration.

The Petitioner filed an Application for Writ of Certiorari to the Georgia Supreme Court. The Georgia Supreme Court denied the Petitioner's Application on September 12, 1997.

ARGUMENTS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully shows that the Court should grant his Petition for Writ of Certiorari. The issues involve the rights of Georgia citizens to contest the taking of their private land in condemnation proceedings.

The Petitioner shows that the State of Georgia has enacted a statutory framework that does not protect the citizen's rights nor provide due process protection. Georgia has enacted statutes that only deal with the amount of

compensation to be paid to the landowner. No statutes nor procedures exist to protect his rights to contest the taking of his land in the first instance.

In this case, the Webster County Board of County Commissioners utilized the expedited taking mechanism found in the Special Master Act, Georgia Laws, 1957, as amended. This is codified in the O.C.G.A. § 22-2-100 through § 22-2-114.

The Special Master Act does not protect the citizen's rights to raise non-value exceptions and objections to the taking of his land. O.C.G.A. § 22-2-108 statutorily defines and delineates the powers and duties of the Special Master.

> "The special master shall serve in lieu of the board of assessors; and his duties and authority, except as otherwise provided in this article, shall be the same as provided by Code Sections 22-2-61 through 22-2-63. The special master shall hold the hearing provided in Code Section 22-2-102 at the time and place provided by the order of the judge of the superior court and in compliance with the duties and authority conferred by this article. The special master shall not be authorized to continue or delay the hearing, except as otherwise provided by Code Section 9-10-150, relating to granting continuances by reason of membership in the General Assembly during sessions thereof, or except upon the written order of the judge of the superior court; and such a continuance shall be granted only for good cause shown to that judge. When it shall be necessary for the judge to grant a continuance, the continuance shall be for not more than

> five days from the date of the order granting a continuance."

Code Sections 22-2-61 through 22-2-63 do not give the Special Master any authority to hear, receive evidence upon, and issue any determination as to non-value issues raised by the private citizen. Indeed, the entire Special Master Act does not authorize the private citizen to raise non-value objections to the condemnation proceeding.

There is no authority nor discretion in the Special Master when he conducts the hearing. He is required by the Georgia Legislature to make an award as requested by the Condemnor following the hearing held pursuant to O.C.G.A. § 22-2-102. *See*, O.C.G.A. § 22-2-110 which states in part:

> "(b) The award shall become a part of the record of the proceedings in said matter and shall condemn and vest title to the property or other interest in the condemning body upon the deposit by that body of the amount of the award into the registry of the court, subject to the demand of said condemnee or condemnees, according to their respective interests."

The Georgia Legislature has mandated that the Special Master use the award form contained in O.C.G.A. § 22-2-110(c) and shall condemn and vest title in the condemning body. That award form concerns only the issue of value.

O.C.G.A. § 22-2-110(d) provides the method by which the citizen may appeal Special Master's award as to the issue of value, but not as to any non-value issues. It is to be a *de novo* investigation.

The trial court, upon receipt of the Special Master's award is statutorily required to condemn the citizen's property. O.C.G.A. § 22-2-111 provides:

> "Upon the entry of the award of the special master and the presentation of the award to the judge of the superior court, the judge shall enter a proper order and judgment of the court condemning the described property or other interest in rem to the use of the condemnor upon the condemnor's paying into the registry of the court the amount provided in the award of the special master."

The entire statutory scheme addresses only the amount of compensation to be paid by the condemnor. It allows no contesting of the condemnation proceeding by the condemnee. Indeed, the Legislature has statutorily mandated that the Special Master and the trial court *shall* condemn the property sought by the condemnor.

Due process is not afforded to the affected citizen in violation of the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 1, Paragraph 1 of the Georgia Constitution, 1983; and, Article 1, Section 1, Paragraph 2 of the Georgia Constitution, 1983.

Here, the Petitioner's due process rights were ignored and disregarded by the taking of his private land. The State of Georgia has devised the statutory scheme that only permits Petitioner to contest the value of his land to be taken. No contesting of the taking of his land is permitted by the Georgia statutes. Again, these statutes mandate that the Special Master and trial court shall condemn the Applicant's land.

In the absence of statutory protections, the Georgia appellate courts have created an ambiguous and changing non-statutory set of case law for consideration of non-value objections. This non-statutory scheme is ever-changing and is made by the appellate courts out of whole cloth. Indeed, the case by case changes and requirements illustrate the lack of due process protection to the citizens of the State of Georgia.

The State of Georgia has two systems of review of condemnation proceedings. There is a detailed and specific statutory procedure for review of value issues. Then, there is undefined changing, non-statutory caselaw system for review of non-value issues.

This ever-changing and shifting caselaw framework can be seen by the appellate decisions in the State of Georgia.

For example, the statutes do not specify that non-value factual issues are to be determined by the trial court without a jury. However, in *Leach v. Ga. Power Co.*, 228 Ga. 16, 22(5) (183 S.E. 2d 755) (1971) it held that the right to appeal "does not carry with it the right to a jury trial on the other issues in the case."

The Special Master Act does not require non-value exceptions to be filed within ten days of the Special Master's award. The appellate court has judicially created this requirement. *See, Sims v. City of Toccoa*, 256 Ga. 368, 370 (349 S.E. 2d 385) (1986): "In order to comply with due process requirements, we hold that the ten days in which to file exception to value issues applies to non-value issues."

Although the Special Master Act does not require the trial court to pass on non-value issues prior to entering and filing judgment of condemnation, O.C.G.A. § 22-2-111, this requirement has been judicially created. *See, Zuber Lumber Company v. City of Atlanta,* 237 Ga. 358, 365 (227 S.E. 2d 362) (1976).

Under the Special Master Act the condemnee is not entitled to a written ruling by the trial court as to its decision to overrule timely non-value exceptions and objections. *See* the instant appeal decision, *Simmons v. Webster County.*

The Special Master Act does not specify what language is necessary to obtain trial court review of non-value exceptions. (Again, because not contemplated that the Special Master would determine them.) The appellate courts have issued decisions stating which condemnees have used appropriate language to request review of non-value issues and which condemnees have not. In *Beck v. Cobb County,* 180 Ga. App. 808, 810 (350 S.E. 2d 818) (1986), it was judicially determined that the condemnee's choice of words ("Appeal to Superior Court/Appeal to Jury Trial" appealing the case "in its entirety to the [superior court] and [demanding] a jury trial") did not satisfy the non-specified, nonstatutory requirements to get a hearing. In that case, *supra,* p. 811, it was held that the condemnee had the responsibility to "assist" the speedy process of the taking of his private land by making specific and not general objections or exceptions to the award of the Special Master. No such requirement has been created by statute. It has simply been judicially determined to exist.

Further, the appellate courts have determined that, although the Special Master Act, Georgia Law, 1957, is silent as to the review of non-value issues, the condemnee must file exceptions to the Superior Court prior to its entry of judgment on the Special Master's award. *See, Styers v. Atlanta Gas Light Co.*, 263 Ga. 856, 857(1) (439 S.E. 2d 640) (1994).

O.C.G.A. § 22-2-110(d) specifies that an appeal of the value award shall be by jury trial and shall be a *de novo* investigation. Again, the Special Master Act is silent as to the appeal and the determination of non-value legal and factual issues. By caselaw, the appellate courts have held that value issues are determined by the jury and non-value issues by the trial court itself.

Because it does not address consideration or appeal of non-value issues, the Special Master Act is silent as to how it is done. Into this vacuum various decisions have entered. In *Wrege v. Cobb County*, 186 Ga. App. 512 (367 S.E. 2d 817) (1980), the appellate court held:

> "The trial judge, however, determined that he was not going to conduct the proceedings [on the non-value exceptions] *de novo*, but instead decided to review the decision of the special master as though occupying an appellate position in the proceedings, thereby addressing only whether there was any evidence to support the special master's finding of fact and whether there were any errors of law in the special master's Conclusions of Law."

This "any evidence" standard of review was held incorrect. The condemnee was entitled to a *de novo* re-adjudication of the non-value issues. However, in the

instant case, *Simmons v. Webster County Board of Commissioners, supra,* it was held that the trial court was not required to conduct an evidentiary hearing on the non-value exceptions because to do so would allow new evidence which was not before the Special Master or a repetition of the evidence which should have been preserved by a transcript. This contradicts previously announced rationale of holding a *de novo* re-adjudication on the non-value issues. This, again, illustrates the ever-changing and shifting requirements of the Georgia appellate courts issued when a citizen attempts to contest the condemnation proceeding. The caselaw is not only changing, but contradictory. The effect of this is to deny the citizen the right of due process and equal protection to contest the taking of his private property. The condemnee's rights to contest non-value legal and factual issues are not grounded in a statute nor constitutional provisions, and are subject to the flow of changing and contradictory caselaw. This ever-changing uncertainty is shown in the Appellate Court rulings. In *Beck v. Cobb County, supra,* the condemnee did not file specific exceptions, but simply appealed the case in its entirety. This was held not to be sufficient to invoke a *de novo* investigation of the Special Master's ruling. In the instant case, the Petitioner filed his written exceptions, but did not present to the trial court a transcript of the proceedings before the Special Master. Since the Special Master followed the specific mandated statutory award form, the Georgia Court of Appeals held that the Applicant did not preserve a record of rulings which the court could have reviewed. The Petitioner and other Georgia citizens' due

process rights under the U.S. Constitution and the Georgia Constitution require a full and fair hearing before the trial court. The guarantees of protection of person and property, being a paramount duty of government, are not met by a determination that was made without an impartial and complete hearing. Georgia Constitution, 1983, Article 1, Section 1, Paragraph 2.

These constitutional protections are meaningless to the affected landowner if the trial court is not required to conduct a *de novo* trial on the non-value issues; if the trial court is not required to receive evidence and testimony on non-value issues; if the trial court can simply hear a portion of oral argument and then deny the objections in total.

The Petitioner respectfully shows that the State of Georgia has not provided constitutional protections to citizens of Georgia to contest the taking of their private property. The State of Georgia has created a dual system of condemnation proceedings. The Special Master and trial court are statutorily required to grant the condemnation sought by the condemnee. Only an ambiguous and ever-changing, and sometimes contradictory set of appellate cases deal with any non-value exceptions and objections the affected citizen may have.

CONCLUSION

The Petitioner respectfully request that this Court grant its Petition for Certiorari to present these matters in full to the Court.

Respectfully submitted,

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SECOND DIVISION
BIRDSONG, P.J.,
BEASLEY and BLACKBURN, JJ.

NOTICE: MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION to be deemed timely filed. (Court of Appeals Rule 4 and 37, January 1, 1995)

March 4, 1997

In the Court of Appeals of Georgia

A96A1861. SIMMONS v. WEBSTER COUNTY. 91-119

BEASLEY, Judge.

Condemnee Simmons appeals the condemnation award of $675 in this eminent domain case. Despite the amount of the judgment, a direct appeal lies. *Walker v. Ga. Power Co.*, 177 Ga. App. 493, 494 (339 SE2d 728) (1986).

Webster County filed a petition for condemnation of an easement and right-of-way in, to and over Simmons' land for use as a public road and for the controlling and backing up of water, including the right to back water onto Simmons' land to the full extent water was there prior to July 1994. The plat exhibited with the petition showed a proposed total easement strip of 140' in width, which would constitute an extension of the 60' easement and right-of-way the county already had. A lake had existed on the land adjacent to the existing easement and right-of-way from 1957 to July 1994, except for a short period in 1970.

The county elected to proceed by the quicker, "simpler and more effective method of condemnation" provided for in OCGA § 22-2-100 et seq. The county wanted the additional easement to 140 feet and the specified additional rights in order to qualify for FEMA and GEMA money to rebuild the road and the dam on which it sat, which had been washed out by a flood in July 1994. It intended to include public parking spaces on the extended easement, so people could fish in the lake when it was restored. The county also planned to install a new drainage control system within the 140' easement so it could keep the lake at the July 1994 level.

Simmons was the only named condemnee. He was served and a special master appointed. OCGA §§ 22-2-103 and -107. A hearing was held, OCGA §§ 22-2-108 and -109, and the special master filed an award in the form required by OCGA § 22-2-110. He awarded $700 for the property and interests sought to be condemned and found no consequential damages or benefits. The award was made the judgment of the court the same day it was filed with the court. OCGA § 22-2-111.[1]

Condemnee Simmons appealed to the superior court from that award pursuant to OCGA § 22-2-112 and also filed exceptions to the special master's findings, rulings, and award. These were timely because they were filed within ten days after the award was filed, even though

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[1] Although the court purported to condemn the property for the county in absolute and fee simple title, the judgment did not as a matter of law condemn more than the easement and right-of-way the condemnor sought. *Leach v. Ga. Power Co.*, 228 Ga. 16, 22(6) (183 SE2d 755) (1971).

they were filed after the court's judgment. *Sims v. City of Toccoa,* 256 Ga. 368, 370 (349 SE2d 385) (1986). Cf. *Earth Management v. Heard County,* 248 Ga. 442, 445(3) (283 SE2d 455) (1981). The judgment was premature but not void. *Styers v. Atlanta Gas Light Co.,* 263 Ga. 856, 858(1) n.1 (439 SE2d 640) (1994). Thereafter Simmons filed an answer to the petition, setting out his defenses before the court.

A jury was selected to try the issue as to the value of the property and interest taken and the damage done. OCGA § 22-2-112. Immediately before trial the court considered argument on condemnee Simmons' exceptions to the special master's award and overruled them in toto after refusing to consider evidence as to any of them. The primary contentions Simmons raised at the hearing were that because the county was condemning control over the lake bed it was also taking that land or at least an easement over it and that such a taking was not for a necessary public purpose. The condemnor countered that any damage to Simmons' property adjacent to the 140' easement could be considered by the jury in measuring consequential damages, if any.

The jury trial on the value of the taking was held, and the court disallowed any evidence of the value of the lake bed, having ruled that it was not condemned in this proceeding and that the only property at issue was the 140' easement for road, slope, and drainage. Based on the evidence and the jury charge of the court, which limited the issue to the fair market value of the additional 1.8 acres in the 140' easement and gave no instruction on consequential damages, the jury returned a verdict for $675. This is the amount the county's appraiser had given to the new easement.

1. On appeal, the first enumeration is that the trial court erred in ruling on Simmons' exceptions without hearing any evidence on the non-value issues and by refusing to issue a written order. As to the latter, Simmons cites no authority, and there is no such requirement in the statute governing the special master proceeding or elsewhere in the Code, compare OCGA § 9-11-52, or in case law construing the special master method of condemnation. It is certainly preferred, but not mandated so long as there is record of the ruling.

Regarding the reception of evidence, the law provides that as to the special master condemnation proceedings, "it shall be desirable to have a judicial ascertainment and judicial supervision of all questions and proceedings connected with the matter." OCGA § 22-2-102.1. As discussed in *Sims*, supra, the law contemplates that the court will hear and determine non-value issues raised by way of timely exceptions. "A special master is authorized to make 'critical determinations' other than value, [Cit.], and the only method of correcting any errors a special master may have made is by filing an appeal in the superior court where the action was begun. [Cit.]" *Sims*, supra at 369. "In order to obtain review of the non-value issues determined by the special master, a party must file exceptions with the superior court. . . . " *Styers*, supra at 857(1).

The premature judgment was in fact abrogated by the trial court, because the court did consider Simmons' exceptions to the special master's resolution of non-value issues and a jury tried the value issue anew. OCGA § 22-2-111 provides that "[u]pon the entry of the award of the special master and the presentation of the award to

the judge of the superior court, the judge shall enter a proper order and judgment . . . " Although this implies the entry of an immediate judgment if construed literally, account must be taken of the ten-day allowance for appeal from the special master's award, to a jury as to value and to the superior court for non-value issues. Generally, then, judgment should not be entered until the time for appeal has expired without entry of an appeal. If an appeal is taken, judgment must be held in abeyance until the appeal is resolved, as it vests the condemnor with the property or other interest condemned upon payment of the award into the court registry. OCGA §§ 22-2-111, -114; *Zuber Lumber Co. v. City of Atlanta*, 237 Ga. 358, 365 (227 SE2d 362) (1976), criticized on another matter, *Styers*, supra at 859-860.

The Supreme Court in *Styers* noted that the judgment on the non-value issues was entered at one time and the judgment on the value issue was entered later. *Styers*, supra at 858, n.2. That is appropriate so that the court proceedings do "not hinder or delay in any way the condemnor's work or the progress thereof." OCGA § 22-2-112. This serves the purpose of the special master method of condemnation, which is stated in OCGA §§ 22-2-101 and -102. But it is error to enter a final judgment of condemnation without passing on timely filed exceptions to the special master's award. *City of Atlanta v. Turner Advertising Co.*, 234 Ga. 1, 3 (214 SE2d 501) (1975).

The court was not required to conduct an evidentiary hearing on the exceptions, because that would allow new evidence which was not before the special master or a repetition of evidence which should have been preserved

by a transcript. Insofar as Simmons excepted to findings of the special master, the court was unable to consider the merits because there was no transcript of the special master hearing presented and no written findings other than as required by OCGA § 22-2-110. Compare *Sims*, supra. See also *Wrege v. Cobb County*, 186 Ga. App. 512, 514(2) (367 SE2d 817) (1988), where the record showed that the condemnees raised all legal issues in the proceeding before the special master, who orally ruled on them; and *Leach*, supra at 18-21, where the court had a report of the special master stating rulings made on certain motions and objections.

As in *Beck v. Cobb County*, 180 Ga. App. 808, 810 (350 SE2d 818) (1986), the exceptions were not properly preserved for review as to the non-value issues. In *Beck* the condemnees did not file exceptions but simply appealed the case " 'in its entirety' " and in such manner sought to present the non-value issues to the superior court. Id. at 808. In Simmons' case, he filed exceptions but did not preserve a record of rulings which the court could review. It is to be a de novo hearing before the superior court on the exceptions, but the non-value issues must have been raised and ruled on by the special master and preserved for the review of exceptions. *Wrege*, supra. The trial court cannot rule on what Styers describes as the "exceptions to the special master's resolution of non-value items," supra at 859(2), unless the "items" or issues are raised before the special master, ruled on, and preserved by a record which the trial court can examine. The exceptions opportunity is "the means by which judicial review of those issues may be had." *Styers*, supra at 860.

The special master is not required to make written findings of fact or conclusions of law, such as an auditor must (see OCGA § 9-7-8), other than as provided in OCGA § 22-2-110(c). *Sweat v. Ga. Power Co.*, 235 Ga. 281, 284(2) (219 SE2d 384) (1975).[2] In *Sweat*, the court had a report of the special master in addition to the award, plus a transcript of the special master's hearing. Id. at 285.

"[T]he only method of correcting any errors . . . a special master may have made in the original hearing and award is . . . by an appeal in the superior court, which begins again the process of adjudication." *City of Savannah Beach v. Thompson*, 135 Ga. App. 63, 65-66(2) (217 SE2d 304) (1975). Value is to be decided by a jury in a de novo investigation, OCGA § 22-2-110(d), and "issues of law erroneously decided by the special master . . . [are to be] readjudicated by the superior court judge." Id.[3]

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[2] But see the dissent in *Sweat* and OCGA § 9-11-52(a).

[3] Because of the procedural infirmity, i.e., lack of a special master record, we do not reach the issue of whether the superior court's consideration of exceptions to the special master's decision is de novo with respect to fact issues or only de novo as to legal issues. "Non-value" issues would encompass both, but the case law sometimes references legal issues as though that were the extent of the superior court's domain in ruling on exceptions. The question surfaces in *Wrege*, supra. In both *Walker v. Ga. Power Co.*, 177 Ga. App. 493, 497(1) (339 SE2d 728) (1986), and *Budd Land Co. v. City of Valdosta*, 165 Ga. App. 534 (301 SE2d 699) (1983), the superior court ruled on motions for summary judgment, which included new evidence and stipulations of fact produced in superior court. Compare the role of the appellate division of the Workers' Compensation Board, both before and after the 1994 Amendment of OCGA § 34-9-103(a). See *Bankhead v. Beavers*, ___ Ga. ___ (Case No. S96A1814, decided February 17, 1997.

Simmons not only filed exceptions and appeal to a jury, he also filed an answer to the petition, setting out the defenses put forth at the pre-trial hearing, among others. But this was too late. *Nodvin v. Ga. Power Co.*, 125 Ga. App. 821, 822-823(2) (189 S.E.2d 118) (1972).

Thus, Simmons was obligated to raise the issues again in the context of the appeal to the jury on the issue of value, but could do so only insofar as they affected the value of what was taken. It is "a de novo proceeding, and it is the duty of the trial judge, by pre-trial order or during the course of the trial, to rule on all legal issues." *Zuber*, supra at 364. See also *Banks v. Ga. Power Co.*, 220 Ga. App. 84, 87(7) (469 SE2d 218) (1996). "What [OCGA §§ 22-2-112 and 22-2-114] make very clear is that the court, and not the jury on appeal, will decide the *quantity* of interest of each condemnee, and . . . will also decide the *quality* of such interest, for the reason that the appeal to the jury goes to the issue of value only and it is not intended by this act . . . to leave any other subject matter for jury determination." *Johnson v. Fulton County*, 103 Ga. App. 873, 884 (121 SE2d 54) (1961) (on motion for rehearing). (Emphasis in original.) "The question of *what* is to be taken, when in doubt, is a mixed question of law and fact, and . . . the trial court has the power and duty to make the findings of fact necessary to determine the question of law in order 'to speed the cause,' i.e., to get the issue of value before the jury as soon as possible." *DeKalb County v. Jackson-Atlantic Co.*, 123 Ga. App. 695, 698 (182 SE2d 160) (1971) (Emphasis in original); *Walker v. Ga. Power Co.*, 177 Ga. App. 493, 497(1) (339 SE2d 728) (1986).

2. Simmons enumerates in two errors the court's refusal to allow him to introduce evidence, during the

course of the jury trial on value, as to the value of his property adjacent to the 140' easement and as to consequential damages to this property.

"Taking private property for the benefit of the public is an exercise of high power, and all the conditions and limitations provided by law must be closely followed. Too much caution cannot be observed to prevent oppression and abuse. . . . [It is] necessary to have 'judicial ascertainment and supervision of *all questions and proceedings* connected with the matter.' Ga. L. 1957, p. 389, § 3. (Emphasis supplied.) 'Constitutional due process of law includes notice and hearing as a matter of right where one's property interests are involved. [Cit.]' [Cit.]" *Sims*, supra at 369-370.

The property condemned was an easement and right-of-way over 1.8 acres of Simmons' property for use as a public road and for the right to control and back water so as to create a lake as had existed in July 1994 before the flood which destroyed the road and dam. Simmons contended at the hearing on his exceptions and throughout the trial that this taking constituted much more than an easement for a road and sloped dam to hold up the road. As shown by the county's plat, he owned the land on both sides of the road. He testified that he owned 65 acres, including 37 acres on the one side where a lake had been and the county intended to re-create it.

The lake had originally been created by Simmons' predecessor in title, Kennedy, who put in boards to retain the water when the county acquired a perpetual easement in July 1957 for constructing and maintaining an earthen elevation and a public road to run over it. Previously,

there had been a dirt road and rickety wooden bridge. When the lake drained in 1970, because of a flood and consequent break in the elevated roadway, which served as a dam for the lake, Kennedy reestablished the lake within a few weeks. The drain mechanism is on that property. Kennedy, and Simmons after him (he bought the property in 1988), controlled the existence and level of the lake.

After the lake was destroyed in 1994, Simmons planted trees on the lake bed. He contended that the property interests condemned in effect also condemned the lake bed because the county acquired the right to control the water flow so as to create a lake. At the least, he asserted, this constituted the taking of an easement over the lake bed, for the county's purposes of creating a public lake. In the alternative, he argued, the easement and rights described in the petition for condemnation created consequential damages to that lake bed owned by Simmons because it would be covered by water and thus preclude his use of it other than as a member of the public. He sought to introduce evidence of value of that land and what it could be used for. As he points out, the county introduced evidence on the subject of the value of the lake bed, but the court refused to permit Simmons to show otherwise and limited the scope of the issue of value to the 1.8 acres in the 140' easement.

The only easement not in dispute was the 60' easement acquired in 1956 or 1957. Although there was some testimony that this was widened another 20' by later acquisition when the road was paved between 1987 and 1989, no documentary evidence supported this and the county did not pursue a claim of right to that additional

20'. Its real estate appraiser gave estimated value for the difference between 60' and 140', the width the county needed to meet FEMA and GEMA requirements.

The court ruled, in error, that the county had earlier acquired an easement in the lake bed and thus had "every right to cover [it] back up with water, just like it was." There was no evidence of such. The county stated that the lake bed was not county property and that it was not seeking to condemn any interest in the lake bed. The county did not even claim in its petition that it had an interest in the lake bed, as evidenced by the description of what it sought to condemn and in the drawing which it submitted. Both sides of the 140' easement are shown as belonging to "J. Ed Simmons." The only evidence was that the lake was created by the lake bed owner, reestablished by him when it diminished, and was permitted to remain until nature swept it away in 1994.

In making this finding in the course of the jury trial, the court at the least deprived the condemnee of any consequential damages to the lake bed occasioned by the right to flood it. Consequential damages are to be taken into consideration. OCGA § 22-2-109(c). " 'The proper measure of consequential damages to the remainder is the diminution, if any, in the market value of the remainder in its circumstance just prior to the time of the taking compared with its market value in its new circumstance just after the time of the taking.' [Cit.]" *Dept. of Transp. v. Whitehead*, 169 Ga. App. 226, 230(3) (312 SE2d 344) (1983), *aff'd*, 253 Ga. 150 (317 SE2d 542) (1984). See also *Colonial Pipeline Co. v. Williams*, 206 Ga. App. 303, 304 (425 SE2d 380) (1992). In keeping with the court's erroneous view

that the county already had an easement in the lake bed, it did not charge the jury on consequential damages.

The total nature of the taking was in dispute, and the court's finding that the county already had an easement over the lake bed for the purpose of creating a lake precluded consideration of condemnee's evidence and argument that by taking control of whether a lake was created or not, and its level at any given time, condemnor was either acquiring the lake bed itself or was condemning an easement on it. This mixed issue of fact and law as to what property and interests were included for condemnation must first be determined by the trial court before a jury can be asked to value what is taken. The ownership of the lake bed was not to be determined by this jury, which according to the Code is only to find the value of condemnee's taken property.

The judgment must be reversed for a new trial of the value of all of the property interests taken, i.e., the 1.8 acre easement for the road and dam slopes, and the right to control the accumulation of water on the lake bed to the extent of the water level that existed before the flood in July 1994. Before the jury can set the value, the trial court itself must determine *what* in legal terms is being taken. *DeKalb County v. Jackson-Atlantic Co.*, supra. Does the right of control, as expressed in the petition and to the extent shown by evidence of intended use, in effect constitute acquisition of the lake bed in fee simple, or of an easement over the lake bed, or of no interest in it at all but only a taking adjacent to the lake bed, subject to consequential damages, if any, in the lake bed? See *Brown v. Tomlinson*, 246 Ga. 513, 514 (272 SE2d 258) (1980); *Harrison v. Ga. Power Co.*, 255 Ga. 74 (335 SE2d 389) (1985);

Stephens County, &c. v. Wright Bros. Constr. Co., 215 Ga. App. 352 (451 SE2d 802) (1994); Pindar, *Ga. Real Estate Law and Procedure*, § 8-1, p. 358 (3rd ed. 1986).

In cases where there is condemnation of lake or pond property, the interest that is taken depends on the needs of the condemning authority. For example, in *Galloway v. Board of Com'rs of Banks County*, 246 Ga. 472 (271 SE2d 784) (1980), property condemned for watershed, flood control and soil conservation purposes, but ultimately used for recreational purposes, was condemned in fee simple. In *State Highway Dept. v. Davis*, 129 Ga. App. 142 (199 SE2d 275) (1973), the highway department condemned a certain amount of land in fee simple, which included a four-acre body of water, and a drainage easement and a detour easement "to acquire a right of way in Bulloch County for Interstate Highway 16." Id. In *Stephens Cnty.*, supra, the county soil and water conservation district had an easement "to over-flow[,] flood and store water impounded by flood-retarding structures" on the fee owner's land.

Insofar as the constellation of property rights in this case being a necessary taking, OCGA § 22-2-102.1 provides that "the condemning body shall be the exclusive judge . . . of the necessities of the public needs." It means what it says. *Zuber Lumber Co.*, supra at 360(4). The condemnor's discretion "will not be interfered with or controlled by the courts unless it is shown that the condemning authority acted in bad faith or beyond the powers conferred upon it by law. [Cit.]" *Sweat*, supra at 284(3). Discretion will not be interfered with unless the record shows the condemnor "acted in bad faith or capriciously." *Leach*, supra at 23(7). This issue was waived by

Simmons' inadequate preservation of the proceeding before the special master.

3. Simmons' motion for emergency stay and direction is denied as moot.

Judgment reversed and remanded. Birdsong, P. J., and Blackburn, J., concur.

IN THE SUPERIOR COURT OF WEBSTER COUNTY
STATE OF GEORGIA

WEBSTER COUNTY, acting by and through its **BOARD OF COUNTY COMMISSIONERS**, Petitioner/Condemnor,	CIVIL ACTION FILE NO.: **95CV21**
vs.	
J.E. SIMMONS, who resides at Preston, Georgia, an easement for the construction and installation across and through part of **Land Lot No. 211** in the 25th Land District of Webster County, Georgia, for a public road, the controlling and backing of water, as set forth in this petition, and the rights of any and all other persons claiming any title, right or interest in the property described herein, Condemnees.	

BE IT REMEMBERED that on this **5th day of February, 1996,** before the HONORABLE THAD GIBSON, a motion to suppress hearing was had in the above-captioned case as follows:

For the Petitioner /Condemnor:

JESSE BOWLES, III
Bowles & Bowles
201 Court Street
Post Office Drawer 99
Cuthbert, Georgia 31740

For the
Condemnees:

REAGAN W. DEAN
Attorney at Law
191 Lawrence Street
Suite 510
Marietta, Georgia 30060

[p. 2] PROCEEDINGS

THE COURT: Who is the moving party here?

MR. DEAN: Well, Judge –

THE COURT: Are you the moving party?

MR. DEAN: Judge, we have filed exceptions to the Master's rulings and findings of award. It'd be our position, Judge, that the County as the condemnor is the moving party in this action. We have filed exceptions which would be in the way of defenses or objections to the condemnation proceeding. So, it would be our position that the county is the moving party and would have to set forth its case to –

THE COURT: What objections?

MR. DEAN: They were filed with the Court on July 31, 1995.

THE COURT: I see it here.

MR. DEAN: Yes, sir. Entitled exceptions to J. Simmons, the Special Master's filings, rulings and awards.

MR. BOWLES, JR.: You'll have to speak up.

MR. DEAN: Yes, sir; yes, sir.

MR. BOWLES, JR.: Are you talking about the original objections or the later objections? You've filed two sets.

THE COURT: I've got the one where you're objecting [p.3] to Robert Reeves on the grounds that –

MR. BOWLES, JR.: That's been cured, Judge. You appointed Mike Green in his place.

THE COURT: Okay; excuse me. Let me get to that one.

MR. DEAN: Yes. sir.

THE COURT: You're not talking about exceptions to Special Masters findings and rulings are you?

MR. DEAN: Let's see, Judge; may I?

Yes, sir. This is what I am speaking of; yes, sir.

THE COURT: This is it; let me see what it has to say.

All right. Mr. Bowles, do you want to respond to these exceptions?

MR. BOWLES, JR.: Jesse has just been through it.

Do you want to do that?

MR. BOWLES, III: Sure.

If, Your Honor, please, basically, as the Court well knows, the only issue to be tried to the jury is the issue of value or the issues on an appeal from the Special Masters' ruling, is within the breast of the Court, the Court's discretion.

So, the condemnor made no exceptions to the Special Master's award. And obviously, the condemnor had brought this proceeding in order to take this property [p. 4] for a public purpose. and therefore, the burden of going forward as to these exceptions would be on the condemnee.

Now, he's basically said – there are about seventeen of them. And some of them are fairly redundant, say the same thing as, but they basically said that the Special Master proceeding, and the proceeding that was filed here was unconstitutional.

He's saying that the property was taken, not for a public purpose. He's saying that – and this is a, sort of an issue that would come up, I think, in the fact finding case – but there, apparently, was a finding by the Special master, that a portion of this roadway was already adversely possessed by the County. He's taken exception to that. That would be a question of fact for the jury, deciding how much the taking of it was and how much the value of it was, rather than a legal question.

He's has also said two or three or four times that it was not taken for a public purpose. And then he said that the County had no right to take this property pursuant to a request or a widening project as may be required by FEMA, which is this federal flood –

THE COURT: Yeah.

MR. BOWLES, III: – organization. So, basically, it's the County's position that the pleadings show that [p. 5] they've properly gone forward, they've had this Special Master's hearing. The burden would be on him to

show whether the proceedings were unconstitutional and where there's no public purpose or where there is no – some sort of procedural wrongdoing or –

THE COURT: All right. Dean?

MR. DEAN: Judge, if I may respond. This was an actual condemnation brought by the County. And you can't just file an action in court saying well, I'm entitled to go forward with this action, unless you can establish with the proper evidence that the County, in fact, has the authority to do what it says – that the County followed proper steps to do what it seeks to do. And that what it seeks to do is constitutional and for a public purpose.

These are all issues, aside from the value issue, – these are all issues that are within the breast of the Court, and we would submit, on the part of – behalf of the condemnee, that these are issues that the County has burdens, burden of establishing once an objection or exception have been made to their – to the action. And, it's pretty much, I believe, like most –

THE COURT: What's your grounds for it being unconstitutional?

MR. DEAN: Well, Judge, we would submit to the [p. 6] Court that it involves taking of property from Mr. Simmons without proper compensation, without due process and that it's excessive taking over and above what is needed.

THE COURT: Of course the compensation is a jury matter. The other, you'd have to cite me some law on it. What's the basis for it?

MR. DEAN: Judge, well the basis for the exceptions here are both constitutional and the fact that we believe that the public – the taking is not for a public purpose. There was testimony brought fourth that the –

THE COURT: Excuse me. Wouldn't that be a presumption as for a public purpose with yours the burden of showing it's not?

MR. DEAN: No, sir. Judge. I would disagree with that, respectfully. I would submit that it would be upon the County, which is taking a private citizen's land, to establish that they, in fact, are doing this for a public purpose. and not the private citizen's responsibility to prove that it was not for a public purpose.

THE COURT: Please state the purposes.

MR. BOWLES, JR.: Yes, sir.

THE COURT: I'd still say it's on you to show that [p. 7] it's not for public purpose.

MR. BOWLES, JR.: A widening of an existing right-of-way –

THE COURT: Yeah.

MR. BOWLES, JR.: Now they have tried to inject into the case that we're condemning the whole body of land because the water has been on it for years. But that's not in this condemnation proceeding.

We have a right to the land. It's a right by having possessed it and maintained the water on it for approximately forty years. And it not only affects Mr. Simmons, but it affects other riparian land owners who wanted it to

continue. But that's not in this case. We didn't condemn that, per se.

They're trying to get into evidence because of the claim that they were damaged from it. But this – the reason the water came off of this land, and the evidence would show further the flood we had in 1994 when it washed out everything in this – most of the roads and the bridges in this area.

THE COURT: Does the County claim that they had possessed the land under some claim of rights?

MR. BOWLES, JR.: Yes, sir. They dealt with the road and ground approximately forty years ago. And that was testified to, and it has been maintained since then, [p. 8] continuously every year since then.

But we're not seeking to condemn that. And we don't have – by prescription, we don't have it and we're not asking for it. That's something that might come up later, but it's not in this case.

MR. DEAN: If I may respond to that, Judge?

THE COURT: Yes.

MR. DEAN: What the County is seeking to do is to try to limit this discussion to simply narrow – not narrow, but 140-foot wide easement that the County now seeks.

THE COURT: Is that what they're condemning?

MR. DEAN: That's part of what they're condemning here by saying we want to condemn this 140-

foot wide easement, which will then allow us to reconstruct a dam, to reconstruct a roadway that was washed out.

But it's going to be more than just that of the 140-foot easement. Effective because of the fact that once the County rebuilds that dam, they're going to fill it out – fill back in behind it with the lake, which –

THE COURT: Well, you're talking about a consequence of damages there aren't you?

MR. DEAN: Well, we're also talking, Judge, that the County is now seeking, in effect, to take 65 acres of land that Mr. Simmons owns in that bottom next to the [p. 9] dam without establishing an easement over it. What the County's trying to do is establish a 140-foot wide easement. Then they're going to fill it in with the water behind that, and take Mr. Simmons' land, his use of his land back, that 65 acres that adjoins this easement.

THE COURT: I can't even speculate on what they may do later on, but it seems to me, we're dealing with whatever it is they've condemned.

MR. DEAN: I don't think it's any question, Judge, that the County's intention is to, once they rebuild this dam and roadway and 140-foot easement, is to fill in behind it with a lake. Which, the lake is going to sit on top of Mr. Simmons' property.

THE COURT: Maybe they're going to do that. I can't – we can't litigate that in this proceeding.

MR. DEAN: Well, Judge, that is part of our exceptions and objections, is that they attempted to take

his land from him, by this easement, without a condemnation proceeding on that land itself. He's got approximately 65 acres of land that's, de facto, going to be condemned, if this 140-foot easement goes through without any condemnation proceeding on that 65 acres. So that is part of our objections, Judge.

MR. BOWLES, III: Your Honor, if I might respond [p. 10] just very quickly.

THE COURT: Yeah.

MR. BOWLES, III: The taking involves that property described in the petition in the pleadings before this Court, they can take no more or no less.

THE COURT: I understand.

MR. BOWLES, III: And this question about how it might affect other land, is a question that the Court has picked up on consequential damages. The Court would exercise its discretion as to how far it may go on that, but that's that issue.

THE COURT: All right. I deny your exceptions. Overrule them; whatever. Is there anything else you need to take up?

MR. DEAN: Judge, if I may, for the record, I'd like to make a proffer of evidence we would submit on behalf of Mr. Simmons –

THE COURT: All right.

MR. DEAN: – in this exceptions issue. Judge, if I may, for the record, on proffer, we would submit evidence establishing that the prior easement that the

County had over this same area that's smaller than the present easement the County now seeks, that the County now seeks an easement, not for the purpose of public reconstruction, in the sense that, now seeking, instead [p. 11] of a 80- or 60-foot easement – 140-foot easement, the sole purpose of that is because they're seeking to get FEMA, federal Emergency Management Agency, and GEMA, Georgia Emergency Management Agency, funding for its project to establish upon that project, public parking, public access. To create, in effect, a public lake on it's property. That the taking that the County proposes would not establish; it's not for public purposes. Would be excessive of what is needed to actually do the project. That it takes from Mr. Simmons private property that he's not being compensated for.

It was also to show, Judge, that there are other ways, or other possible ways to do this project, this condemnation and it's roadway dam proceeding other than what the County has sought to do here.

We would also submit, Judge, that show that there was taking of Mr. Simmons' property without due process and protection, without the authority of the law and without giving him adequate, just compensation.

We'd also, Judge, show that there would be, on the issue of adverse possession, evidence that would go to deny the establishment of adverse possession overtaking this property as the County contends that it has. That there are, in fact, and the evidence will show other possible ways to rebuild this project, other than what [p. 12] the County has done, that would involve a lesser taking of property.

And, if I could have just one more minute, Judge? Thank you.

THE COURT: Anything else?

MR. BOWLES, III: No, sir.

MR. DEAN: If I – Judge, I may just have one follow-up, real quick.

And, Judge, it would be in our contention that we would be entitled to an evidentiary hearing upon these exceptions. But I understand the Judge has ruled.

THE COURT: All right.

MR. DEAN: Thank you, sir.

THE COURT: One o'clock.

MR. DEAN: Thank you, Judge.

(Hearing concluded.)

[p. 13] CERTIFICATE

STATE OF GEORGIA)
COUNTY OF LEE)

I, Rene Armstrong, Certified Court Reporter, hereby certify that the foregoing proceedings were taken down by me, were later reduced to typewritten form under my direction, and that the foregoing pages represent a true, complete and accurate transcript of said proceedings.

Witness my hand this 7th day of April, 1996.

/s/ Rene A. Armstrong
RENE A. ARMSTRONG,
CCR, CVR
Georgia Certificate No. B-1735

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: September 12, 1997

Reagan Walter Dean
191 Lawrence Street
Suite 510
Marietta GA 300601659

Case No. S97C1218

J.E. SIMMONS V. WEBSTER COUNTY

COURT OF APPEALS CASE NO. A96A1861

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

22-2-100. "Condemning body" and "condemnor" defined.

As used in this article, "condemning body" or "condemnor" means:

(1) The State of Georgia or any branch of the government of the State of Georgia;

(2) Any county or municipality of the State of Georgia;

(3) Any housing authority;

(4) Any other political subdivision of the State of Georgia which is vested with the power of eminent domain; and

(5) All other persons possessing the right or power of eminent domain. (Ga. L. 1957, p. 387, § 1; Ga. L. 1962, p. 461, § 1; Ga. L. 1967, p. 825, § 1.)

22-2-101. Effect of article on other methods of condemnation; intent of article.

This article shall be supplementary to and cumulative of the methods of condemnation described in Articles 1 and 3 of this chapter in cases in which the state, or any branch of the government of the state, or any county, municipality, or other political subdivision of the state, or any housing authority, or any other person possessing the power of eminent domain is concerned. This article is intended to provide a simpler and more effective method of condemnation in those cases where a judicial supervision of the proceedings is desirable by reason of the

necessity for a quick determination of the just and adequate compensation to be paid the owner of the property or interest subject to be condemned, or by reason of the number of parties at interest or the conflicting interests of such parties, or in cases where there are parties who are non compos mentis or who are not sui juris or who are nonresidents, or in cases where there are conflicting interests or doubtful questions. In all particulars not otherwise specially provided for in this article, the court shall conform its procedure as nearly as possible to articles 1 and 3 of this chapter. (Ga. L. 1957, p. 387, § 2.)

22-2-102. Filing of petition of condemnation; order for parties to appear before special master, make known their rights or interests, etc.; time of hearing before special master; directions for notice and service thereof; attachment of process to petition; cause to proceed in rem.

Whenever it is desirable, for any reason, to arrive at a quick and certain determination of the compensation to be paid first to the condemnee for the taking or damaging of private property, the condemnor shall file a petition in a superior court having jurisdiction for a judgment in rem against the property or interest therein, as provided in Code section 22-2-130. At or before the filing of the petition, the condemnor shall present a copy of the petition to a judge of the superior court of the county wherein the property or interest sought to be condemned is located. Thereupon, the judge shall make an order

requiring the condemnor, the person in possession of the property or interest, and any other person known to have any rights in the property or interest to appear at a hearing before a special master at a time and place specified in the order and to make known their rights, if any, in and to the property or interest sought to be condemned, their claims as to the value of the property or interest, and any other matters material to their respective rights. The hearing before the special master shall take place not less than ten days nor more than 15 days after the date of service of the order. The order shall give such directions for notice and the service thereof as are appropriate and as are consistent with this article, in such manner as to provide most effectively an opportunity to all parties at interest to be heard. It shall not be necessary to attach any other process to the petition except the order so made, and the cause shall proceed as in rem. (Ga. L. 1957, p. 387, § 5.)

22-2-102.1. Petitioning superior court for judgment in rem.

Whenever it shall be necessary for such condemning body to take or damage private property, or any interest or easement therein, in pursuance of any law so authorizing, for any public purpose, and where, by reason of the necessities of the public needs, of which the condemning body shall be the exclusive judge, and it shall be desirable for these reasons to have a quick and effective adjudication of the just and adequate compensation to be paid the owner or owners of such property before taking the

same, and it shall be desirable to have a judicial ascertainment and judicial supervision of all questions and proceedings connected with the matter, such condemning body may, through any authorized representative, petition the superior court of the county having jurisdiction, for a judgment in rem against said property, or any easement or other interest in said property, condemning the same in fee simple to the use of the petitioner upon payment of just and adequate compensation therefor. (Ga. L. 1957, p. 387, § 3; Code 1981, § 22-2-102.1, enacted by Ga. L. 1983, p. 3, § 16.1.)

22-2-102.2. Contents of petition.

The petition referred to in Code Section 22-2-102.1 shall set forth:

(1) The facts showing the right to condemn;

(2) The property or interest to be taken or damaged;

(3) The names and residences of the persons whose property or interests are to be taken or otherwise affected, so far as known;

(4) A description of any unknown persons or classes of unknown persons whose rights in the property or interest are to be affected; and

(5) Such other facts as are necessary for a full understanding of the cause. (Ga. L. 1957, p. 387, § 4; Code 1981, § 22-2-102.2, enacted by Ga. L. 1983, p. 3, § 16.1.)

22-2-103. Appointment of special master – Generally.

The special master provided for in this article shall be appointed by the judge or judges of the superior courts of each judicial circuit and shall discharge the duties provided for in this article. Nothing contained in this article shall be construed as limiting the number of special masters for the circuit, and any judge of the superior court may appoint a special master for any particular case or cases. The special master so appointed must be a competent attorney at law, be of good standing in his profession, and have at least three years' experience in the practice of law. His relation and accountability to the court shall be that of an auditor or master in the general practice existing in this state. He shall hold office at the pleasure of the judge and shall be removable at any time with or without cause. Each special master shall take and file in the office of the clerk of the superior court of the county in which the property or interest to be condemned is situated, along with the order of his appointment, an oath or affidavit substantially in the form prescribed in Code Section 22-2-105. (Ga. L. 1957, p. 387, § 6; Ga. L. 1984, p. 682, § 1.)

22-2-104. Same – Form to be used in appointing special master.

Substantially, the following form should be used in appointing a special master:

> _____, a competent attorney at law, residing in the_____ Judicial Circuit, and of at least three years' experience in the practice of law, is hereby appointed a special master in and for the

_____ Judicial Circuit, to discharge the duties of special master as provided in the condemnation law of this state. This appointment is __ (either for general duties or for a particular case, as the case may be).

This _____ day of _____, 19___.

_____
Judge, Superior Court

22-2-105. Appointment of special master – Oath of special master.

The special master is required to take the following oath to be filed along with the order of his appointment in the office of the clerk of the superior court of the county in which the property or interest to be condemned is situated:

I, _____, do swear that I will faithfully, well, and truly perform the duties of special master under the condemnation law, according to law and to the best of my skill and ability.

_____

Sworn to and subscribed
before me this _____
day of ____, 19_____
_____

(Title and authority
of attesting officer)

22-2-106. Compensation of special master; allowance by judge of reasonable time for special master to inspect premises.

(a) The compensation of the special master shall be provided for by a proper order of the judge of the superior court; shall be included in and made apart of the judgment of the court condemning the property or any interest therein sought to be taken, such judgment to be based on the award of the special master; shall be paid by the condemning body; and shall not be less than $50.00 per day nor more than $250.00 per day for the time actually devoted to the hearing and consideration of the matter by the special master. The compensation of the special master shall be assessed as court costs and shall be paid prior to the filing of any appeal from the judgment of the court; provided, however, that if such compensation has not been determined and assessed at the time of filing any such appeal, the same shall be paid within 30 days from the date of assessment.

(b) The judge may allow the special master a reasonable period of time for personal inspection of the premises and may compensate the special master for his time spent inspecting the premises and for any actual expenses incurred by him in connection with the inspection, provided that the special master shall file an affidavit with the court showing his time spent in inspection and itemizing his expenses. (Ga. L. 1957, p. 387, § 9; Ga. L. 1975, p. 27, § 1; Ga. L. 1988, p. 408, § 2.)

22-2-107. Service of process; award by special master and judgment of court conclusive as to right of condemnor to take or damage property or interest.

(a) Copies of the petition, together with the order of the court provided for in Code section 22-2-102, shall in all cases be served upon the person in possession of the property or interest sought to be condemned and upon all persons who are known to have any rights in such property or interest.

(b) The return of service signed by the sheriff or his lawful deputy, or an affidavit of service executed by any citizen of this state, reciting that a copy of the petition and order was served upon the named condemnee in person or by leaving a copy at the place of his residence, shall be sufficient evidence as to the service of the named condemnee. It shall be the duty of the sheriff or citizen, as the case may be, to cause service to be made within three days from the date of the order of the judge on the petition.

(c) If any of the condemnees or other persons known to have any rights in the property or interest reside outside of the county, the judge shall order service to be made upon such party or parties. Such service shall be perfected by causing a copy of the petition and order to be served upon the party or parties by the sheriff or any lawful deputy of the county of the residence of the party or parties. In addition, service may be made by any citizen. The return of such sheriff or lawful deputy, or the affidavit of such citizen that the party or parties were served, either in person or by leaving a copy of the

petition and order at the residence, shall be conclusive as to service.

(d) The sheriff or any lawful deputy of the county where the petition is filed shall serve nonresidents of this state:

(1) By posting a copy of the petition, together with the order of the judge thereon, on the bulletin board at the courthouse door of the county in which the property or interest sought to be condemned is located for not less than five days prior to the time of the hearing before the special master;

(2) By the insertion of a notice identifying the property or interest sought to be condemned, as well as the date and place of the hearing before the special master, in a newspaper having general circulation in the county wherein such property or interest is located, for one issue of said paper, the date of which shall be not less than four nor more than seven days prior to the hearing before the special master, and which is the same newspaper in which the sheriff's advertisements are carried; and

(3) Where the address of such nonresidents is known, by mailing to them by registered or certified mail a copy of the petition and order.

(e) If any of the persons entitled to serve under this Code section are minors, or insane persons, or persons otherwise laboring under disabilities, the guardian or other personal representative of such persons shall be served. If the guardian or personal representative resides outside of the county or is a nonresident, he shall be

served as provided in subsections (c) and (d) of this code section. If such minor or other person laboring under disabilities has no guardian or personal representative, service shall be perfected by serving the disabled person personally or, in in event the disabled person lives outside of the county or is a nonresident, by serving and disabled person by the method provided in subsections (c) and (d) of this Code section for other persons who live outside of the county or are nonresidents, and by serving the judge of the probate court of the county wherein such property or interest is located, who shall stand in the place of and protect the rights of the disabled person or appoint a guardian ad litem for such person.

(f) in the event of unknown persons or unborn remaindermen who are likely to have any rights in the property or interest or the proceeds thereof, the judge of the probate court of the county wherein such property or interest is located shall be served with a copy of the petition and order; and it shall be his duty to stand in the place and protect the rights of such unknown parties or unborn remaindermen.

(g) The purpose of this article being to quicken and simplify the condemnation proceeding in all cases where the public good requires it and to provide for a condemnation in rem against the property or interest required to be taken or damaged and insofar as is reasonably possible to protect the rights of all parties to be heard at the time of the hearing before the special master, a substantial and reasonable effort to comply with the various modes of service provided for in this Code section shall be sufficient. Insofar as concerns the right of the condemning body to take or damage the property or any

interest therein, upon the payment of the amount awarded by the special master into the registry of the court, the award of the special master and the judgment of the court condemning the property or interest to the use of the condemning body shall be conclusive. (Ga. L. 1957, p. 387, § 10; Ga. L. 1966, p. 388, § 1.)

22-2-108. Powers and duties of special master generally.

The special master shall serve in lieu of a board of assessors; and his duties and authority, except as otherwise provided for in this article, shall be the same as provided by Code Sections 22-2-6] through 22-2-63. The special master shall hold the hearing provided for in Code Section 22-2-102 at the time and place provided by the order of the judge of the superior court and in compliance with the duties and authority conferred by this article. The special master shall not be authorized to continue or delay the hearing, except as otherwise provided by Code Section 9-10-150, relating to granting continuances by reason of membership in the General Assembly during sessions thereof, or except upon the written order of the judge of the superior court; and such a continuance shall be granted only for good cause shown to that judge. When it shall be necessary for the judge to grant a continuance, the continuance shall be for not more than five days from the date of the order granting the continuance. (Ga. L. 1957, p. 387, § 1I; Ga. L. 1973, p. 479, § I.)

22-2-109. Factors to be considered in determining or estimating just and adequate compensation; determination of date of taking; inclusion of date of approval of original location of highway in petition for condemnation; newspaper advertisement as to original location of highway, date of location, etc.

(A) In determining or estimating just and adequate compensation to be paid to the owner of any property or interest condemned for public road and street purposes, neither the special master nor the jury, in the event of an appeal to a jury, shall be restricted to the agricultural or productive qualities of the land; but inquiry shall be made as to all other legitimate purposes to which the land could be appropriated. The date of taking as contemplated in this Code section shall be the date of the filing of the condemnation proceedings for the acquisition of the property or interest.

(b) The condemning authority shall cause the petition for condemnation to set forth the date of the approval of the original location of the highway. It shall be the further duty of the condemning authority, within 30 days from the date of the original approval and designation of said location as a highway, to cause the location of said highway in said county to be advertised once each week for four consecutive weeks in the newspaper of the county in which the sheriff's advertisements are carried; and said advertisement shall designate the land lots or land districts of said county through which such highway will be locate. Said advertisement shall further show the date of the said original location of such highway as

hereinbefore provided for in this subsection. Said advertisement shall further state that a plat or map of the project showing the exact date of original location is on file at the office of the Department of Transportation, and that any interested party may obtain a copy of same by writing to the Department of Transportation (2 Capitol Square, Atlanta, Georgia 30334) and paying a nominal cost therefor.

(c) In determining just and adequate compensation for property or interests taken or condemned for public road and street purposes, the award of the special master or the verdict of the jury, in the event of an appeal, shall, in addition to fixing the value of the land actually taken and used for such purposes, take into consideration the prospective and consequential damages to the remaining property or interest from which the property or interest actually taken was cut off, which consequential damages result to such remaining property or interest because of the location of such public road or street upon the portion actually taken. In addition, the increase of the value of such remaining property or interest from the location of such public road or street shall be considered. Such consequential benefits, if any, may be offset against such consequential damages, if any; but in no event shall consequential benefits be offset against the value of the property or interest taken for such public improvement. (Ga. L. 1966, p. 320, § 2.)

22-2-110. Award of special master – Time of filing; award to become part of record of proceedings; vesting of title in condemnor upon deposit of award into court; form of award; use of special master's findings and award in subsequent appeal.

(a) The award of the special master shall be filed with the clerk of the superior court of the county where the property or interest is situated within three days after the date of such hearing.

(b) The award shall become a part of the record of the proceedings in said matter and shall condemn and vest title to the property or other interest in the condemning body upon the deposit by that body of the amount of the award into the registry of the court, subject to the demand of such condemnee or condemnees, according to their respective interests.

(c) The award shall be in the following form:

AWARD OF SPECIAL MASTER

I,_____, the special master appointed and chosen by the court to hear evidence, give full consideration to all matters touching upon the value of the property or interest sought to be condemned, as shown by the description of the property or interest in the case of _____ (condemning body) versus _____ (acres of land or other described interest in said land) and _____ (condemnee), Civil action file no. _____ in superior count, and having first taken the oath as required by law of the special master, the same having been filed with the clerk of the Superior Court of _____ County and having

heard evidence under oath and given consideration to the value of such property or interest on the _____ day of _____, at _____M., as provided for in the order of the court, do decide and recommend to the court as follows:

(1) I find and award to _____, condemnee, the sum of $_____, as the actual market value of the property or interest sought to be condemned;

(2) I find consequential damages to the remaining property or interest in the amount of $_____;

(3) I find consequential benefits to the remaining property or interest in the amount of $_____ (never to exceed the amount of the consequential damages);

(4) Balancing the consequential benefits against the consequential damages, I find and award to the condemnee in this case in the total sum of $_____, and I respectfully recommend to the court that the said property or interest be condemned by a judgment in rem to the use of the condemnor upon the payment of the last stated sum into the registry of the court, subject to the demands of the condemnee.

This _____ day of _____, 19_____.

_____
Special Master

(d) In any case where there is an appeal from the award of the special master to a jury in the superior court, the award of the special master shall not be competent evidence. Any such appeal shall be a de novo investigation, and the award of the special master shall be detached from the papers in the case before the same are delivered to the jury. (Ga. L. 1957, p. 387, § 12; Ga. L. 1984, p. 682, § 3.)

22-2-111. Same – Incorporation of award into judgment of court.

Upon the entry of the award of the special master and the presentation of the award to the judge of the superior court, the judge shall enter a proper order and judgment of the court condemning the described property or other interest in rem to the use of the condemnor upon the condemnor's paying into the registry of the court the amount provided in the award of the special master. (Ga. L. 1957, p. 387, § 13.)

22-2-112. Same – Appeal of award generally.

In case any party is dissatisfied with the amount of the award, he may, within ten days after the award is filed, enter in writing an appeal from the award to the superior court of the county where the award is filed. At the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property or interest taken or the amount of damage done, with the same right to move for a new trial and file an appeal as in other cases

at law. The entering of an appeal and the proceedings thereon shall not hinder or delay in any way the condemnor's work or the progress thereof. (Ga. L. 1957, p. 387, § 14.)

22-2-113. Same – Effect of tender, payment, or acceptance of award on right of appeal; right of owners of separate and distinct parcels to file separate appeal; effect of discrepancy between award of special master and verdict of jury; issuance of execution upon award or judgment.

(a) The tender, payment, or acceptance of the amount of the award shall not prevent any party from prosecuting the appeal.

(b) Where separate and distinct parcels of property are condemned in the same proceeding, the owner of any separate and distinct property may file a separate appeal to a jury in the superior court.

(c) If the amount awarded by the special master is less than that found by the verdict of the jury, the condemnor shall be bound to pay the sum so finally adjudged less the amount previously deposited as provided in Code Section 22-2-110 plus lawful interest on the difference from the date of the order of the special master, in order to retain the property.

(d) If the condemnor fails to pay the amount of the award or judgment within ten days after the same is filed or entered, then the clerk shall issue execution upon such award or judgment which may be levied upon any property of the condemnor. (Ga. L. 1957, p. 387, § 15.)

22-2-114. Effect of deposit of award into court registry; conflicting claims as to deposit.

When the condemnor has paid into the registry of the court the amount provided for in the award of the special master, for the use and benefit of and subject to the demands of the condemnees, the effect of such payment into the registry of the court shall be the same as if paid to the condemnees directly, provided that the clerk shall pay out the money to the condemnees or their personal representatives upon proper proof submitted to him as to the quantity of their interests. Where there are conflicting claims, the clerk may require the conflicting parties to establish their claims before the court as is provided by law in other similar matters. (Ga. L. 1957, p. 387, § 16.)

22-2-61. Power of assessors to subpoena and to compel attendance; right of parties to be represented.

(a) The assessors shall have the same power to issue subpoenas and compel the attendance of witnesses as is vested in the superior court.

(b) Parties may be represented in person or by attorney before the assessors. (Ga. L. 1894, p. 95, §§ 18, 30; Civil Code 1895, §§ 4674, 4686; Civil Code 1910, §§ 5222, 5224; Code 1933, §§ 36-502, 36-503.)

22-2-62. Evidence to be heard by assessors generally.

(a) The assessors shall hear all evidence offered by either party as to the value of the property or of any interest therein to be taken or used, the damages incurred by the owner of the property or of any interest therein,

and the benefits to the owner accruing from the use of the property or interest by the condemnor.

(b) Prospective and consequential damages resulting from the taking may be considered if such damages are plain and appreciable.

(c) The increase of the value of the property or of any interest therein resulting from the proposed public improvement may be considered, but in no case shall such estimated increase deprive the owner of actual damages.

(d) In the estimation of the value of the property or other interest taken for public uses, such valuation need not be restricted to the agricultural or productive qualities of the property or interest, but inquiry may be made as to all other legitimate purposes to which the property or interest could be appropriated. (Orig. Code 1863, §§ 622, 623; Code 1868, §§ 686, 687; Code 1873, §§ 647, 648; Code 1882, §§ 647, 648; Ga. L. 1894, p. 95, § 18; Civil Code 1895, §§ 567, 568, 4674; Civil Code 1910, §§ 688, 689, 5224; Code 1933, §§ 36-503, 36-505, 36-506.)

22-2-63. Manner of Assessment.

The assessors, or a majority of them, shall assess the value of the property or interest taken or used, or the damage done, shall assess the consequential damages to the property or interests not taken, and shall deduct from such consequential damages the consequential benefits to be derived by the owner from the operation of the franchise by the condemnor or from the carrying on of the

business of the condemnor, provided that the consequential benefits assessed, shall in no case exceed the consequential damages assessed; provided, further, that nothing in this Code section shall be so construed as to deprive the owner of the actual value of his property or interest so taken or used. (Ga. L. 1894, p. 95, § 19; Civil Code 1895, § 4675; Civil Code 1910, § 5225; Code 1933, § 36-504.)

IN THE SUPERIOR COURT OF WEBSTER COUNTY
STATE OF GEORGIA

WEBSTER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS,	:	CIVIL ACTION FILE NUMBER 95CV21
Petitioner/Condemnor,	:	(Filed July 31, 1995)
v.	:	
J. E. SIMMONS, who resides at Preston, Georgia, an easement for the construction and installation across and through part of Land Lot No. 211 in the 25th Land District of Webster County, Georgia, for a public road, the controlling and backing of water, as set forth in this petition, and the rights of any and all other persons claiming any title, right or interest in the property described herein,	:	
Condemnees.	:	

EXCEPTIONS OF J. E. SIMMONS, CONDEMNEE, TO SPECIAL MASTER'S FINDINGS, RULINGS AND AWARD

COMES NOW J. E. Simmons, Condemnee, and files his Exceptions to the Special Master's Findings, Rulings,

and Award prior to the approval of said award and prior to the entry of any Judgment by a judge of this Court.

Exceptions

1.

The Condemnee excepts to the Special Master's failure to find that the Condemnation proceedings and Special Master Proceedings violated the Condemnee's rights under the Constitution of the United States and the Constitution of the State of Georgia, including but not limited to violation of his rights to due process, equal protection under the law, taking without authority of law, and taking without adequate and just compensation.

2.

The Condemnee excepts to the Special Master's findings that the Condemnor is pursuing the instant Condemnation as a part of its governmental operation.

3.

The Condemnee excepts to the Special Master's findings that the Condemnor is carrying on as part of its governmental operations the control of water.

4.

The Condemnee excepts to the Special Master's findings that the establishment of a lake on private property has a purported public purpose.

5.

The Condemnee excepts to the Special Master's findings that the Condemnor has title to the Condemnee's property and land under the theory of adverse possession.

6.

The Condemnee excepts to the Special Master's findings that there has been any adverse possession by the Condemnor of Condemnee's lands.

7.

The Condemnee excepts to the Special Master's findings that the Condemnee needs to adversely possess his land for twenty (20) years to regain title to said land from the Condemnor.

8.

The Condemnee excepts to the Special Master's findings that the Condemnor has found it necessary to widen a prior easement and right of way.

9.

The Condemnee excepts to the Special Master's findings that the easement and property right for use or right of way is a public purpose.

10.

The Condemnee excepts to the Special Master's findings that a perpetual easement for a public road and dam maintenance easement on County Road Number 3 had been maintained by the Condemnor.

11.

The Condemnee excepts to the Special Master's findings that the acceptance of funds from the Federal Emergency Management Agency (hereinafter, "FEMA") constitutes a public purpose.

12.

The Condemnee excepts to the Special Master's findings that the widening of the easement, the creation of public parking on said widened easement, and the establishment of a lake are public purposes.

13.

The Condemnee excepts to the Special Master's findings that FEMA's regulations and rules require the widening of the prior easement.

14.

The Condemnee excepts to the Special Master's findings that the Condemnor is required or needs to comply with purported FEMA rules or regulations in order to rebuild the dam and county road.

15.

The Condemnee excepts to the Special Master's findings that the reestablishment of a lake on private property by the Condemnor constitutes a public purpose.

16.

The Condemnee excepts to the Special Master's findings that the Condemnor's proposed taking is for a public purpose.

17.

The Condemnee excepts to the Special Master's findings that the Condemnor had properly authorized the instant taking.

Respectfully submitted,

/s/ Reagan W. Dean
REAGAN W. DEAN
ATTORNEY FOR CONDEMNEE
STATE BAR NUMBER 214862

Suite 510
191 Lawrence Street
Marietta, Georgia 30060
(404) 425-1335

CERTIFICATE OF SERVICE

I hereby certify that I have this date served opposing counsel with a true and correct copy of the within and foregoing EXCEPTIONS OF J. E. SIMMONS, CONDEMNEE, TO SPECIAL MASTER'S FINDINGS, RULINGS AND AWARD by depositing a copy of same in the United States Mail, first-class postage pre-paid addressed to:

Jesse G. Bowles, Esquire
BOWLES & BOWLES
P.O. Box Drawer 99
Cuthbert, GA 31740

This, the 27 day of July, 1995.

/s/ Reagan W. Dean
REAGAN W. DEAN
ATTORNEY FOR CONDEMNEE
STATE BAR NUMBER 214862

191 Lawrence Street
Suite 510
Marietta, Georgia 30060

(404) 425-1335

IN THE SUPERIOR COURT OF WEBSTER COUNTY
STATE OF GEORGIA

WEBSTER COUNTY, ACTING BY AND THROUGH ITS BOARD OF COUNTY COMMISSIONERS,	:	**CIVIL ACTION FILE NUMBER 95CV21**
Petitioner/Condemnor,	:	(Filed August 7, 1995)
v.	:	
J. E. SIMMONS, who resides at Preston, Georgia, an easement for the construction and installation across and through part of Land Lot No. 211 in the 25th Land District of Webster County, Georgia, for a public road, the controlling and backing of water, as set forth in this petition, and the rights of any and all other persons claiming any title, right or interest in the property described herein,	:	
Condemnees.	:	

ANSWER

COMES NOW J. E. Simmons, Condemnee herein, presents this Answer to Petition for in rem condemnation of an easement or leasehold interest before a Special Master.

First Defense

The Petition fails to state a claim upon which relief may be granted.

Second Defense

The Condemnation proceedings and Special Master Proceedings violated the Condemnee's rights under the Constitution of the United States and the Constitution of the State of Georgia, including but not limited to violation of his rights to due process, equal protection under the law, taking without authority of law, and taking without adequate and just compensation.

Third Defense

The Condemnee shows that the Condemnor is not pursuing the instant Condemnation as a part of its governmental operation.

Fourth Defense

The Condemnee shows that the Condemnor is not carrying on as part of its governmental operations the control of water.

Fifth Defense

The Condemnee denies that the establishment of a lake on private property has a purported public purpose.

Sixth Defense

The Condemnee denies that the Condemnor has title to the Condemnee's property and land under the theory of adverse possession.

Seventh Defense

The Condemnee denies that there has been any adverse possession by the Condemnor of Condemnee's lands.

Eighth Defense

The Condemnee denies that the Condemnee needs to adversely possess his land for twenty (20) years to regain title to said land from the Condemnor.

Ninth Defense

The Condemnee denies that it is necessary to widen a prior easement and right of way.

Tenth Defense

The Condemnee denies that the proposed widened easement and property right for use or right of way is a public purpose.

Eleventh Defense

The Condemnee denies that a perpetual easement for a public road and dam maintenance easement on County Road Number 3 had been maintained by the Condemnor.

Twelfth Defense

The Condemnee denies that the acceptance of funds from the Federal Emergency Management Agency (hereinafter, "FEMA") constitutes a public purpose.

Thirteenth Defense

The Condemnee denies that the widening of the easement, the creation of public parking on said widened easement, and the establishment of a lake are public purposes.

Fourteenth Defense

The Condemnee denies that FEMA's regulations and rules require the widening of the prior easement.

Fifteenth Defense

The Condemnee denies that the Condemnor is required or needs to comply with purported FEMA rules or regulations in order to rebuild the dam and county road.

Sixteenth Defense

The Condemnee denies that the reestablishment of a lake on private property by the Condemnor constitutes a public purpose.

Seventeenth Defense

The Condemnee denies that the Condemnor's proposed taking is for a public purpose.

Eighteenth Defense

The Condemnee denies that the Condemnor had properly authorized the instant taking.

Nineteenth Defense

The Condemnee answers the enumerated paragraphs of the Petition as follows:

1.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

2.

The Condemnee admits that the lands and property are situated in Webster County, Georgia, but is without information or knowledge sufficient to form a belief as to the truth of the remaining averments.

3.

Admitted.

4.

Admitted.

5.

Admitted.

6.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

7.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

8.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

9.

The Condemnee admits that his name and address are set forth in exhibit "C", but is without information or

knowledge sufficient to form a belief as to the truth of the remaining averments.

10.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

11.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

12.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

13.

The Condemnee is without information or knowledge sufficient to form a belief as to the truth of the averments.

WHEREFORE, the Condemnee respectfully requests that the Court deny the Petition of the Condemnor and to cast all cost of court upon the Condemnor.

Respectfully submitted,

/s/ Reagan W. Dean
REAGAN W. DEAN
ATTORNEY FOR CONDEMNEE
STATE BAR NUMBER 214862

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served opposing counsel with a true and correct copy of the within and foregoing ANSWER by depositing a copy of same in the United States Mail, first-class postage pre-paid addressed to:

Jesse G. Bowles, Esquire
BOWLES & BOWLES
P.O. Box Drawer 99
Cuthbert, GA 31740

This, the 7 day of August, 1995.

/s/ Reagan W. Dean
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Supreme Court, U.S.
FILED
JAN 7 1998
CLERK

No. 97-940

In The

Supreme Court of the United States

October Term, 1997

J. E. SIMMONS,

Petitioner,

vs.

WEBSTER COUNTY, acting by and through its BOARD OF COUNTY COMMISSIONERS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Respondent, Webster County, agrees with the general statement of the case included in Petitioner's Petition for Writ of Certiorari, with a few exceptions. Respondent disagrees with the assertion that the condemnation proceeding included an attempt by the County to create a public lake or recreational area for any citizens of the County of Webster. Webster County has no intention of creating a public facility and the express purpose of obtaining the property was to repair the roadbed which had been washed out by the flood. In repairing the roadbed, it was necessary for the dam to be recreated because the old lake bed relied upon the road as the damming agent for the lake. In addition to the dam, a drainage control system was necessary to insure that the County had a mechanism available to release water to avoid the dam being washed out upon a flooding situation similar to the great flood of 1994. Thus, the drainage control was placed on County property, upon the completion of the condemnation of the site, to insure the roadbed would not be washed out again during flooding. All other procedural information contained in Petitioner's Petition is accurate as to filing and Court rulings.

REASONS FOR DENYING THE WRIT

Respondent respectfully shows this Court that Petitioner's Request for Petition for Writ of Certiorari should be denied. Petitioner's rights are adequately protected by Georgia Law and the mechanisms necessary to protect these rights have been employed by the Petitioner with unfavorable results toward the Petitioner's position in this matter.

The Petitioner complains the State of Georgia does not have an adequate statutory framework to protect his rights concerning "non-value" issues in a condemnation. Specifically, the

Petitioner argues he was not afforded the right to contest the width of the easement obtained by the County, or even the necessity of the easement and condemnation occurring.

Petitioner complained case law which has established certain rights under the Special Master's Act, Georgia Laws, 1957, as amended, is inadequate to protect his rights. He further complains the codified law of the Special Master's Act under the Official Code of Georgia Annotated, § 22-2-100 through § 22-2-114, is also inadequate.

Petitioner's position is clearly erroneous. Georgia Law provides a very distinct and clear manner for all non-value issues to be challenged under the Special Master's Act.

A Georgia Court of Appeals case concerning the condemnation of property by Fulton County succinctly and exhaustively outlined the entire condemnation process and the rights afforded under condemnation by Georgia Law. *Johnson v. Fulton County*, 103 Ga. App. 873, 121 S.E. 2d 54 (1961). The court first noted that Georgia allowed a condemnor to elect to use either the Special Master's Law, which was enacted in 1957, or the older Three Assessor Law, enacted in 1894. *Id.* at 876. The court noted the Condemnor had the right to make the decision as to which method of procedure is used. *Id.* First and foremost, the Special Master's Act established three important principles: (1) The original arbiter must be a competent attorney under oath whose relation and accountability to the court shall be that of an auditor or master in the general practice. *Id.* at 877. (2) The Special Master must make an accurate determination of what constitutes a taking for the purposes of the act. *Id.* (3) The Special Master decides all value and non-value issues and, absent properly filed exceptions, the decision is final. The court noted,

> It being the purpose of this Chapter 2, so far as reasonably possible, to protect the rights of all parties to be heard at the time of the hearing before the Special Master, but that, so far as the right to take or damage the property, or any interest therein, by the condemning body, upon payment of the amount of the award by the Special Master into the registry of the Court, is concerned, the award of the Special Master and the Judgment of the Court condemning the property for the use of the condemning body shall be conclusive.

Id. at 878.

The court opined, nothing could be more definite than the powers imposed by this act. *Id.*

The Three Assessor's Law had certain weaknesses; mainly, it was not speedy enough and problems with injunctive relief. *Id.* at 881. The Special Master's Act attempted to create a condemnation proceeding which would be more efficient and effective. This act clearly provides any condemnee may present to the Special Master claims about the value of the property and any other matters material to their rights therein. *Id.* The condemnee has every opportunity to provide all objections and exceptions to non-value issues before the Special Master. He does not, however, have the right to a trial by jury concerning non-value issues and the *Johnson* case is clear, a trial by jury is not a constitutional right and it is clearly up to the legislature to determine whether or not a jury or the judiciary shall decide these matters. *Id.* at 882.

Georgia Law is clear that although there is no right to appeal a Special Master's award to a jury on non-value issues, an appeal can be held before the Superior Court, so long as exceptions

have been timely filed. *Sweat v. Georgia Power*, 235 Ga. 281, 219 S.E. 2d 384 (1975). Once these exceptions have been filed before the Special Master, the trial court may hear these exceptions anew. Petitioner proceeded with this process in the case at hand. Once the trial court overruled the Petitioner's exceptions, Petitioner filed with the Georgia Court of Appeals and with the Georgia Supreme Court to argue the findings were incorrect concerning non-value issues. The Georgia Court of Appeals ruled against the Petitioner. The Georgia Supreme Court refused to grant Certiorari on the matter. Petitioner has used every avenue necessary to challenge non-value issues. Petitioner has been afforded his due process rights and all other rights guaranteed under the Constitution to challenge non-value issues. The only issue which the Petitioner is upset about is, in truth, an adverse ruling concerning his belief the area taken was incorrect. The process used to determine this matter is the same process which has been in effect since at least 1957. Georgia Law has clearly outlined the procedure necessary to challenge non-value issues as explained in *Sweat v. Georgia Power Company*.

It is illogical to argue that Georgia Law does not grant protection to a condemnee on non-value issues. In 1979, the Georgia Power Company, Georgia's predominate utility company, initiated a condemnation proceeding against Ms. Camilla Hardy Harwell. *Harwell v. Georgia Power Company*, 154 Ga. App. 142, 267 S.E. 2d 769 (1980). Ms. Harwell, in her responsive pleadings, and at the hearing before the Special Master, challenged the authority of Georgia Power concerning the condemnation alleging there was no necessity for the taking of the entire tract and other matters. *Id.* at 145. The Superior Court denied every exception and Ms. Harwell appealed to the Georgia Appellate Court by properly filing an Interlocutory Appeal, permission having been granted pursuant to Code Annotated § 6-701(A2). *Id.* at 146. Ms. Harwell's challenge to

the taking of Georgia Power was not ruled in her favor because the court found there was a legitimate public need for the condemnation of the real property. *Id.* at 147. This case, however, illustrates a procedure exists for challenging findings concerning non-value issues and the court will hear these matters.

While *Harwell* establishes the procedure exists and allows the opportunity to be heard, the case of *Earth Management, Inc. v. Heard County*, 248 Ga. 442, 283 S.E. 2d 455 (1981) clearly establishes such challenges can be heard and ruled in favor of the condemnee. In *Earth Management* a company sought to develop a hazardous waste disposal facility in Heard County. *Id.* at 442. In response to this attempt, Heard County proceeded to condemn the property in which Earth Management held an option to purchase to create a public park and, in effect, thwart the efforts of Earth Management to create this hazardous site. *Id.* Earth Management challenged the condemnation proceeding which granted the condemnation to Heard County on several grounds, including constitutional due process deficiencies. *Id.* at 445. The court cited *Sweat v. Georgia Power Company*, and stated the Special Master's Act is constitutional and not violative of due process rights of the condemnee. *Id.* Earth Management further contended they did not receive proper notice of the Special Master's condemnation findings and, therefore, were barred from filing exceptions prior to judgment being rendered. *Id.* at 445-446. The court ruled the Judge had stayed the judgment until such time as he heard Earth Management's exceptions and contentions concerning non-value issues and, therefore, any defect in this matter was cured. *Id.*

The court, however, did find that the motivation and reason behind the condemnation was based, not on public necessity, but rather on an attempt to stop the building of this hazardous waste site. Because of this improper motivation, the court overruled the Special Master's finding and determined the

condemnation was improper. *Id.* at 448. The non-value issue of whether or not the condemnation should have proceeded forward was heard by the Special Master, Superior Court Judge, and the highest court in Georgia. After having heard the evidence, the highest court ruled in favor of the condemnee. Clearly, a definitive procedure existed to allow the condemnee the opportunity to challenge the non-value issues. This definitive procedure exists for the Petitioner in Georgia today. Petitioner has exhausted this avenue and is now unhappy with the results. Unhappiness with the results, however, does not equate with the necessity of the United States Supreme Court hearing this matter.

Georgia courts have ruled the primary duty of the Special Master is to ascertain the value of property; but his other legal duties are also to determine the right of the condemnor to condemn, the interest to be condemned, the nature of the interest taken, and the effect of the condemnation upon the respective rights of the parties so long as the parties raise these issues at the Special Master's Hearing. *Allen v. Hall County*, 156 Ga. App. 629, 275 S.E. 2d 713 (1980) at 631. The case goes further to state:

> To raise objections, exceptions must be taken to the Master's findings prior to the Superior Court's entry of an Order and Judgment condemning the property. Failure to make these exceptions will finalize the Judgment of the Court, unless the Judgment is reversed or set aside in a manner provided by law.

Id. at 631.

The *Allen* case further explained that the parties to the case had failed to properly raise exceptions prior to the Final Judgment being rendered. Therefore, their rights were waived.

Id. In the present case, Petitioner did not waive his rights in the proceeding, but rather filed proper exceptions, had these exceptions rejected by the Special Master, Superior Court Judge, and the Appellate Courts of Georgia. Petitioner's real complaint results from his dissatisfaction with the ruling of these courts. The procedure necessary to challenge value is clearly in place, has been implemented by the Petitioner, and a result and decision reached by the courts of Georgia. There is no need for an issuance of a Writ of Certiorari in this matter, because Georgia Law clearly provides adequate protections and procedures necessary for a condemnee to challenge all non-value issues in Georgia.

CONCLUSION

The Respondent respectfully requests that this Court deny Petitioner's Petition for Writ of Certiorari because Georgia Law clearly provides ample protections and procedures necessary for a citizen or condemnee to challenge all non-value issues brought under its Special Master's Act of 1957.

Respectfully submitted,

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